

With Fracing Comes Litigation: What Ohio Courts Can Expect As Horizontal Drilling and Hydraulic Fracturing Begin

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Amidst the uncertainty concerning the impact that hydraulic fracturing (“fracking” or “fracing”) will have upon economy and the environment in Ohio, there is at least one thing that we can count on: there will be lawsuits. From lease disputes, to personal injury claims, to claims alleging diminution in property values, there is a wide array of civil litigation that will result as fracing practices begin in Ohio. This article addresses some of the current litigation across the country concerning fracing, including a series of cases that have recently been filed in Ohio.

Tort-based Litigation Concerning Fracing Practices

The most media-provoking fracing litigation arises from claims that fracing dislodges toxic and carcinogenic chemicals that contaminate underground water systems. Similarly charged lawsuits concern the noise and air pollution generated by the gas compressor stations that purify the natural gas for consumer use.

For example, in *Fiorentino v. Cabot Oil & Gas Corp.*, Case No. 3:09-CV-2284 (M.D. Pa.), sixty-two plaintiffs seek damages for groundwater contamination allegedly resulting from the defendants’ drilling activities in or around Dimock, Pennsylvania. Twenty-four of the plaintiffs allege personal injury claims, while all sixty-two of the plaintiffs assert claims for medical monitoring. The plaintiffs maintain that they have experienced property damage and physical illness, that they live in constant fear of future illness, and that they suffer severe emotional distress. The claims sound in negligence, nuisance, strict liability, breach of contract, violations of the Pennsylvania Hazardous Sites Cleanup Act, and fraudulent misrepresentation, among others. Discovery has been referred to a special master, and the case remains pending as of this time.

Several similar lawsuits are currently pending in Pennsylvania regarding groundwater contamination. See, e.g., *Berish v. Southwestern Energy Production Co.*, Case No. 10-1981 (M.D. Pa.) (asserting claims that one of the defendant’s wells had insufficient casing, which led to a discharge of pollutants and other industrial waste — including fracing fluid — into the ground and contaminated the water supply used by the Plaintiffs); see also *Otis v. Chesapeake Appalachia, LLC*, Case No. 3:11-CV-00115 (M.D. Pa.) (alleging similar claims but currently stayed pending binding arbitration); *Armstrong v. Chesapeake Appalachia, LLC*, Bradford County C.P. Case No. 10CV000681 (remanded from the Middle District of Pennsylvania to Bradford County Court of Common Pleas).

Texas, Arkansas, and West Virginia have also seen recent litigation related to fracing practices and the impact on nearby landowners. See, e.g., *Harris v. Devon Energy Production Co.*, Case No. 4:10-cv-708 (E.D. Tex. 2011) (alleging groundwater contamination). In Arkansas, a number of the lawsuits have been asserted as class actions in the United States District Court for the Eastern District of Arkansas. See *Tucker v. Southwestern Energy Co.*, Case No. 11-44 (E.D. Ark. 2011) (class action alleging water and air contamination); *Inardi v. Frontier Gas Services, LLC*, Case No. 4:11-vc-00420 E.D. Ark. 2011) (class action concerning defendants’ compressor stations near the plaintiffs’ properties; alleges claims relating to alleged noise and air pollution).

The foregoing represent just a few of the numerous cases that have been filed against oil and gas companies concerning fracing.

It is apparent that the plaintiffs' bar has zeroed its attention on fracing and will likely aggressively pursue opportunities as they arise in Ohio.

Litigation Concerning Lease Disputes

In addition to tort-based claims related to fracing practices, contractual disputes regarding lease and assignment rights are destined to arise. In fact, a number of contractual disputes have already been filed in Ohio state courts.

In *Summitcrest, Inc. v. Eric Petroleum Co., Columbiana Co.* Case No. 2011 CV 00745 (C.P. 2011), the plaintiff landowner is seeking a declaratory judgment to prevent Defendant Chesapeake Exploration, LLC ("Chesapeake"), from entering upon its property to drill a well. Chesapeake alleges that it has a right to dig a well as an assignee to a lease dated April 24, 2004. The plaintiffs disagree alleging that the lease contains language that terminates the lessee's drilling rights in the event it allows a period in excess of one year to elapse between the completion/abandonment of a well and the commencement of actual drilling operations of a well. None of the defendants have yet responded to the lawsuit, which was filed on October 20, 2011.

In *Ohio Buckeye Energy, LLC v. Beck Energy Co., Columbiana Co.* Case No. 2011CV742, the plaintiff alleges that, the defendant, Beck Energy Corporation ("Beck"), breached a contractual obligation to sell and assign oil and gas rights to the plaintiff, Ohio Buckeye Energy, LLC ("Ohio Energy"). Beck is the lessee under certain oil and gas leases. Ohio Energy alleges that in February 2011, Beck agreed to sell its "deep rights" under the leases, which include the mineral rights lying below the area that is currently being drilled by Beck. The original purchase price was set at \$2,000 per net mineral acre. The lawsuit alleges that in September 2011, Beck "stonewalled the transaction" and refused to honor the agreement unless Ohio Energy paid it \$4,500 per net mineral acre. Beck has not yet responded to the lawsuit.

With the amount of money at stake, Ohio can expect many lawsuits pertaining to the rights under oil and gas leases and assignments. The actual lawsuits that are filed will be as diverse as the language in the contracts themselves. Moreover, many of the leases and assignments occurred years and decades ago, further complicating business transactions, and requiring judicial intervention in order to settle the disputes.

Litigation Concerning Fracing Bans

A final category of fracing litigation concerns bans that local governments have implemented to stop fracing before it starts.

In early June of this year, Morgantown, West Virginia, implemented a ban on fracing. The oil and gas companies reacted swiftly, filing a lawsuit concerning the ban in *Northeast Natural Energy v. City of Morgantown, Monogalia Co., Circuit Court Case No. 11-411 (C.C. 2011)*. The plaintiff, Northeast Natural Energy ("Northeast"), had wells covered by the ban that the State of West Virginia had already approved. On August 15, 2011, the court entered summary judgment for Northeast, holding that the ban was preempted by the state's regulatory scheme.

Similar litigation is pending in New York. The Town of Dryden, New York is currently defending a similar ban on drilling before the Tompkins County Supreme Court. The Town of Dryden is not alone - 51 other municipalities across New York have either changed their zoning regulations or passed laws to ban the process.

Here in Ohio, a number of local governments have either implemented or plan to implement fracing bans. For instance, Athens is currently considering a ban. Further, Plain Township has actually implemented a ban. In addition to the local bans, a number of Democrats in the Ohio House have called for a moratorium on fracing until a federal study on the potential impacts is completed.

As more local governments attempt to implement conditions and bans on drilling rights, it is likely that those affected will commence litigation to prevent the bans from being put into practice. The tension between local home rule as granted to municipalities by the Ohio Constitution and the necessity of general, consistent laws across the state as enacted by the Ohio General Assembly very likely may ultimately have to be determined by the Ohio court system.

Authors
